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No. 98-1319

In The

# Supreme Court of the United States

October Term, 1998

KIDDER, PEABODY & CO. INCORPORATED, et al.,

*Petitioners,*

v.

JOHN W. MATHEWS, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANTHONY P. PICADIO
*Counsel of Record*
PICADIO MCCALL MILLER & NORTON
4680 USX Tower,
600 Grant Street
Pittsburgh, PA 15219-2702
(412) 288-4000

THOMAS W. HENDERSON
3975 One Oxford Centre
301 Grant Street
Pittsburgh, PA 15219
(412) 261-6474

*Counsel for John W. Mathews, et al., Respondents*

Of Counsel

TYBE A. BRETT
835 Chalmers Place
Pittsburgh, PA 15243
(412) 341-3813

March 17, 1999

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OR CALL COLLECT (402) 342-2831

## RESTATEMENT OF THE QUESTION PRESENTED

Whether upon enactment of the Private Securities Litigation Reform Act of 1995 all pending RICO cases based on allegations of securities fraud were terminated.

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTION PRESENTED..... i

TABLE OF AUTHORITIES ..... iii

COUNTERSTATEMENT OF THE CASE ..... 1

ARGUMENT ..... 3

I. THE PETITION FAILS TO PRESENT ANY COMPELLING REASON TO GRANT REVIEW ..... 3

A. The Petition Fails to Present an Important Question of Widespread Applicability..... 3

B. The Petition Fails to Demonstrate Any Need for the Court to Revisit Statutory Retroactivity..... 4

C. There Is No Conflict Among the Circuits .. 5

D. The Court of Appeals Correctly Decided the Issues Presented in the Petition..... 6

II. CONCLUSION ..... 8

# TABLE OF AUTHORITIES

Page

CASES

*District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Reps. v. Prudential Securities, Inc.*, 925 F.Supp. 1551 (N.D. Ga. 1996) ..... 6

*Fujisawa Pharmaceutical Co., Ltd. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997) ..... 5

*Gubitosi v. Zegeye*, 28 F.Supp.2d 298 (E.D. 1998) ..... 4

*Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) ..... 3, 5, 7, 8

*In re Prudential Securities Incorporated Limited Partnership Litigation*, 930 F.Supp. 68 (S.D.N.Y. 1996) ..... 6

*Krear v. Malek*, 961 F.Supp. 1065 (E.D. Mich. 1997) ..... 6

*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ..... 3, 5, 7

*Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d (1997) ..... 3, 5

*Mathews v. Kidder, Peabody & Co., Inc.*, 161 F.3d 156 (3d Cir. 1998) ..... 2, 3, 6, 7, 8

*Rowe v. Marietta Corp.*, 955 F.Supp. 836 (W.D. Tenn. 1997) ..... 6

STATUTES

15 U.S.C. § 78u-4 ..... 1

18 U.S.C. § 1961, *et seq.* ..... 1

18 U.S.C. § 1961(1) ..... 2

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1962 ..... 2

18 U.S.C. § 1964(c) ..... 1

28 U.S.C. § 1292(b) ..... 2

Private Securities Litigation Reform Act of 1995 ("Reform Act"), Pub. L. No. 104-67, 109 Stat. 737 (1995) ..... 1

Fed. R. Civ. P. 23 ..... 2

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, John W. Mathews, Carole Ann Nuckton, Patrica J. Lester, Jordan Brodsky, Thomas C. Chestney, Deborah W. Troemner, William J. Waterman, Jr., Vernon I. Schatz, Melvin H. Roots, Robert J. Holton, James J. Boyle, David L. Robinson, Vincent J. Panepinto, Dominic A. Partell, Francis B. Borcato, John J. Dougherty and Patrick D. Finley, trustees of the Operative Plasters & Cement Masons Local Union Officer & Employee Pension Fund, Lee Crossman, Susanne Diane Anderson and Donald J. Aibel, on behalf of themselves and all others similarly situated, respectfully request that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit be denied.

## COUNTERSTATEMENT OF THE CASE

The issues raised in the Petition involve pure questions of law, and the facts and procedural posture necessary to their resolution can be briefly stated as follows.

On January 23, 1995, Respondents brought this class action under Section 1964(c) of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, based on allegations of a pattern of conduct which would be actionable as fraud in the purchase and sale of securities. After this case was filed and while it was pending, Congress enacted the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995), *codified in* 15 U.S.C. § 78u-4 (the "Reform Act").

Section 107 of the Reform Act amends § 1964 of RICO by providing that a violation of § 1962 can no longer be established by conduct which is actionable as fraud in the sale of securities, in the absence of a prior criminal conviction.[1]

On September 26, 1996, the United States District Court for the Western District of Pennsylvania held, in an opinion reported at 947 F. Supp. 180 (W.D. Pa. 1996), that the Reform Act did not apply to this case. On January 22, 1997, the district court certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) the "issue of the applicability of the Private Securities Litigation Reform Act of 1995 to this case. . . . " (Appendix D-2).

On the same date, the District Court entered an order granting Plaintiffs-Respondents' motion for class certification, and permitting Plaintiffs-Respondents to represent a class of all purchasers of partnership units in KP/Miller Realty Growth Funds I, II, and III, in the initial offering of those securities. (Appendix F-2). Thus, the district court held that the Plaintiffs-Respondents met all the requirements of Fed. R. Civ. P. 23, including adequacy of representation.

On November 16, 1998, the United States Court of Appeals for the Third Circuit affirmed in an opinion reported at 161 F.3d 156 (3d Cir. 1998). The Third Circuit held:

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[1] 18 U.S.C. § 1961(1) defines "racketeering activity" as including "fraud in the sale of securities." Section 1962 prohibits persons from engaging in certain activities through a "pattern of racketeering."

> [T]he RICO Amendment of the Private Securities Litigation Reform Act does not apply to cases pending at the time the Act was enacted. We therefore affirm the order of the district court that Mathews may proceed with his RICO claims against Kidder, Peabody and the other defendants.

161 F.3d at 171 (Appendix A at 38-39). In reaching this holding, Judge Becker, writing for the Court, applied the analyses of this Court in its three recent decisions on statutory retroactivity: *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997).

## ARGUMENT

### I. THE PETITION FAILS TO PRESENT ANY COMPELLING REASON TO GRANT REVIEW

#### A. The Petition Fails to Present an Important Question of Widespread Applicability

This case presents the narrow issue of whether on December 22, 1995, upon enactment of the Reform Act, all pending RICO cases based on allegations of securities fraud were automatically terminated. This issue arose in only a handful of cases pending on the date of enactment, and is presented today in this case and very few, if any, others. Most, if not all, of the other such cases pending on the date of enactment have either been settled or have

been finally adjudicated. There may be cases brought in the future, such as *Gubitosi v. Zegeye*, 28 F. Supp. 2d 298 (E.D. 1998), that involve actions based on conduct occurring prior to passage of the Reform Act, but which were commenced after enactment. However, whether the Reform Act applies to such a case is an issue not raised in the case at bar.

Recognizing the limited applicability of the narrow issue presented in this case, Petitioners have tried to tempt the Court with a broader than necessary statement of issues, *i.e.*, whether jurisdiction-ousting statutes are subject to the traditional presumption against retroactivity. The Court should resist the temptation because the issue as stated by Petitioners is fundamentally statute-specific and depends at least in the first instance on the interpretation of particular statutory language in the context of a specific legislative history. For whether or not a specific statute ousts jurisdiction or merely restates the elements of a cause of action is an issue of statutory construction. And, in any event, as pointed out below, the Court of Appeals correctly applied governing legal principles in holding that Section 107 of the Reform Act was subject to the traditional presumption against retroactive application of statutes.

### B. The Petition Fails to Demonstrate Any Need for the Court to Revisit Statutory Retroactivity

The Court has recently written extensively on the application of newly enacted statutes to pending cases and should await further development of the issue in the lower courts before addressing the issue yet again. Within

the last five years, this Court decided three cases involving the application of newly enacted statutes to pending cases: *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997); and *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). In *Hughes*, decided less than two years ago, a unanimous Court resolved the precise question presented in the petition.

The Court of Appeals applied the rules enunciated in these three recent cases in fashioning an analytical framework for the resolution of cases presenting an issue of statutory retroactivity. No other court of appeals appears to have yet had occasion to do so. The Court should permit further development in the lower courts before deciding whether further guidance from this Court is needed.

### C. There Is No Conflict Among the Circuits

The Petition does not disclose that there is any conflict among the Circuits. Only one other Circuit has addressed the question of whether the Reform Act applies retrospectively to bar further prosecution of a pending RICO predicated on acts of securities fraud. That case, *Fujisawa Pharmaceutical Co., Ltd. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997), like the decision below, held that the Reform Act did not extinguish a pending RICO claim.

Unable to identify a conflict among the circuits, Petitioners say they have found "confusion" in the district courts. However, an examination of the district court

opinions, cited in the Petition at 18, show little, if any confusion. Of the approximately one dozen district court opinions, the overwhelming majority reached the same conclusion as the district court and the court of appeals in this case. *See, e.g., In re Prudential Securities Incorporated Limited Partnerships Litigation*, 930 F. Supp. 68 (S.D.N.Y. 1996), and *District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Reps. v. Prudential Securities, Inc.*, 925 F. Supp. 1551 (N.D. Ga. 1996). The two reported decisions which reached a result different from that in *Mathews* are *Rowe v. Marietta Corp.*, 955 F. Supp. 836 (W.D. Tenn. 1997), and *Krear v. Malek*, 961 F. Supp. 1065 (E.D. Mich. 1997). In those cases, the courts held that the Reform Act would not impair rights if applied retroactively because the plaintiffs had available to them claims under the federal securities acts. While the analysis set forth in those cases is dubious, they are distinguishable from this case, because they included viable Securities Act claims. Thus, all the cases which have decided the precise issue involved here have decided it the same way the Court of Appeals decided the issue. The judicial confusion on which Petitioners base their argument simply does not exist.

### D. The Court of Appeals Correctly Decided the Issues Presented in the Petition

The Third Circuit considered and rejected the Petitioners' argument that the Reform Act was merely a jurisdictional statute which was presumed to apply on enactment to pending cases. In doing so, the Court of Appeals correctly applied recent decisions of this Court.

In an analysis similar to that of the district court, the Court of Appeals quoted *Hughes* to distinguish between intervening statutes that affect substantive rights and those that confer or oust jurisdiction:

> As we stated in *Landgraf*:
>
> > "Application of a new jurisdictional rule usually 'takes away no substantive right but simply *changes* the tribunal that is to hear the case.' Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " [*Landgraf*, 511 U.S. at 274 (emphasis added in *Hughes*).]
>
> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all.

*Mathews*, 161 F.3d at 165 (Appendix A 24-25) (quoting *Hughes*, 117 S.Ct. at 1878). The statute considered in *Hughes*:

> does not merely allocate jurisdiction among fora. Rather it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

*Mathews*, 161 F.3d at 165 (Appendix A-25) (quoting *Hughes*, 117 S.Ct. at 1878).

Based on *Hughes*, the Third Circuit concluded that the RICO amendment, like the amendment at issue in *Hughes*, does not simply allocate jurisdiction among fora, determining where a claim might be brought. Indeed, the Court of Appeals observed that under the Reform Act, RICO cases predicated on securities fraud could not be brought in any court. 161 F.3d at 163 n.14 (Appendix A 19-20). The Reform Act thus speaks not just to the power of the federal courts but to the substantive rights of the parties as well. It is therefore subject to the traditional presumption against retrospective application.

## II. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANTHONY P. PICADIO
*Counsel of Record*
PICADIO MCCALL MILLER
& NORTON
4680 USX Tower,
600 Grant Street
Pittsburgh, PA 15219-2702
(412) 288-4000

THOMAS W. HENDERSON
3975 One Oxford Centre
301 Grant Street
Pittsburgh, PA 15219
(412) 261-6474

*Counsel for John W. Mathews, et al., Respondents*

Of Counsel

TYBE A. BRETT
835 Chalmers Place
Pittsburgh, PA 15243
(412) 341-3813

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